

BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF CALIFORNIA



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In the Matter of Application of Southern
California Edison Company (U338E) for a
Certificate of Public Convenience and
Necessity for the RTRP Transmission
Project.

Application 15-04-013

**APPLICATION FOR REHEARING OF
THE PUBLIC ADVOCATES OFFICE ON DECISION 20-03-001**

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**APPLICATION FOR REHEARING OF
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I. INTRODUCTION

Pursuant to Rule 16.1 of the California Public Utilities Commission (Commission, or CPUC) Rules of Practice and Procedure, the Public Advocates Office at the California Public Utilities Commission (Cal Advocates) respectfully submits this Application for Rehearing of Decision (D.) 20-03-001 (Decision) issued on March 18, 2020. The Decision grants Southern California Edison Company (SCE) a certificate of public convenience and necessity (CPCN) for the Riverside Transmission Reliability Project (RTRP). As a legal prerequisite to granting the CPCN, the Commission ruled that the subsequent environmental impact report (SEIR) prepared for the project meets the requirements of the California Environmental Quality Act (CEQA).¹ The Public Advocates Office asserts that the SEIR does not satisfy the requirements of CEQA and the Commission's finding that it does is unlawful.² Until the legal errors are corrected, the Commission should vacate the Decision.

For reasons explained below, the Decision fails to consider all of the significant environmental impacts of the RTRP as required by Public Utilities (Pub. Util.) Code Section (§) 1002(a)(4). In particular, it did not consider the air quality impacts that may

¹ D.20-03-001 at p. 2. The Commission determined that the SEIR satisfies CEQA requirements (CEQA Guidelines Section 15162).

² D.20-03-001 at p. 34, Conclusion of Law 1.

result from making the Riverside Energy Resource Center (RERC) generation units available to the California Independent System Operator (CAISO) for market dispatch.³ The RERC consists of four 48 megawatt (MW) General Electric LM-6000 gas turbines, with a combined generating capacity of 192 MW.⁴

The environmental impact of air emissions from the RERC was not considered in the Final SEIR because the CAISO only made known its plan to market dispatch the RERC units *after* the Final SEIR was published. The ability of the CAISO to market dispatch the RERC is a direct consequence of the Commission's approval of the RTRP. Because the SEIR did not include an analysis of the environmental impacts of market dispatch of the RERC, the SEIR was not completed in compliance with CEQA and cannot be lawfully certified by the Commission.

The Public Advocates Office contends that the Decision is unlawful and an abuse of discretion for the following reasons:⁵

1. The Commission acted without, or in excess of, its powers or jurisdiction;
2. The findings in the Decision are not supported by substantial evidence in light of the whole record; and
3. The Commission has not proceeded in the manner required by law.

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³ The Decision does not define market dispatch. The CAISO testified that market dispatch includes dispatch of the RERC generation based on its market software, optimized to serve the full CAISO system based on a security constrained economic dispatch. In addition, the CAISO will not need to conduct manual coordination with Riverside during high-load events to meet system and flexibility needs. See Exhibit CAISO-1 at p. 3.

⁴ Exhibit RIV-1 at p. 6.

⁵ A Commission decision in a ratemaking or licensing proceeding, such as this one, may be vacated by a reviewing court if the court finds that: "(1) the commission acted without jurisdiction or in excess of its jurisdiction; (2) the commission has not proceeded in the manner required by law; (3) the decision of the commission is not supported by the findings; (4) the findings in the decision of the commission are not supported by substantial evidence in light of the whole record; (5) the order or decision was an abuse of discretion; [or] (6) the order or decision of the commission violates any right of the petitioner under the Constitution of the United States or the California Constitution. (Cal. Pub. Util. Code § 1757(a). See also *Hillsboro Properties v. Public Utilities Com'n*, 108 Cal.App.4th 246, 133 Cal.Rptr.2d. 343, 349 (2003).

II. BACKGROUND AND PROCEDURAL SCHEDULE

The RTRP will increase transmission capacity to the Riverside Public Utilities by providing a second point of interconnection (a second electric transmission line) to the Bulk Electric System (BES)⁶ for the City of Riverside.⁷ Among other infrastructure changes, the RTRP also includes the addition of a second SCE substation. The new SCE substation (Wildlife) would loop in the new 230 kilovolt (kV) transmission line between SCE's Vista and Mira Loma Substations.

Other than the four 48 MW gas turbine generators stated above, the Riverside Public Utilities also owns and operates the Springs Generation, that includes four 9 MW units, for a total of 228 MW of generation capacity.⁸ The Riverside Public Utilities has been providing electricity to the City of Riverside for a number of years with this fleet of generators and its existing single point of interconnection to the BES. With the addition of a second electric transmission line, Riverside Public Utilities anticipates that it will be able to rely less on its fleet of internal generators.⁹

As required by General Order (GO) 131-D, the RTRP is subject to environmental review pursuant to the CEQA.¹⁰ Furthermore, Rule 2.4¹¹ (Rule 2.4) of Commission Rules of Practice and Procedure requires that “before an applicant seeks authority to undertake any projects, that it is subject to the California Environmental Quality Act of 1970, Public Resources (Pub. Res.) Code Sections 21000 et seq. and the guidelines for

⁶ The Bulk Electric System for purposes of this proceeding is the entire network under the control of the CAISO. See Exhibit SCE-2 at p. 6, fn. 4. BES is defined by the NERC as: “all Transmission Elements operated at 100 kV or higher and Real Power and Reactive Power resources connected at 100 kV or higher. This does not include facilities used in the local distribution of electric energy.” NERC Reliability Standards, (updated May 13, 2019) at p. 6, available at: https://www.nerc.com/files/glossary_of_terms.pdf. See also, FERC Order No. 773, 141 FERC ¶ 61,236 at p. 12.

⁷ D.20-03-001 at p. 3.

⁸ Exhibit PAO-1 at pp. 2-6, fn. 36.

⁹ Exhibit RIV-1 at p. 28.

¹⁰ General Order 131-D, Section IX.

¹¹ CPUC Rules of Practice and Procedure, California Code of Regulations Title 20, Division 1, Chapter 1.

implementation of CEQA, California Code of Regulations, Title 14, Sections 15000 et seq.” With respect to the RTRP, the CPUC is a “Responsible Agency, under CEQA” because the CPCN is a discretionary permit,¹² although the City of Riverside was the “Lead Agency,” under CEQA.¹³

On February 5, 2013, the Riverside City Council certified its Final Environmental Impact Report (2013 Final EIR) for the RTRP.¹⁴ Subsequently, on April 30, 2015, SCE filed the City of Riverside’s 2013 Final EIR with the CPUC as part of SCE’s CPCN Application.¹⁵ But following certification of the 2013 Final EIR by the City of Riverside, the City of Jurupa Valley approved several residential and commercial developments within SCE’s proposed 220 kV transmission line route.¹⁶ In September 2016, SCE revised its proposed transmission line route to avoid four development projects.¹⁷ SCE made the revisions in response to the City of Jurupa Valley’s actions and to avoid eminent domain issues.

The Commission’s Energy Division then determined that the City of Jurupa Valley’s approved developments were a “substantial change in circumstances” that required the Commission to prepare a subsequent or supplemental EIR.¹⁸ Based on the scope of the project, as contemplated by SCE and the Energy Division in September of 2016, the Commission published a Final Subsequent EIR (SEIR) for the RTRP on October 2, 2018.¹⁹

¹² Administrative Law Judge’s Ruling Giving Notice of Timing of Prehearing Conference (June 10, 2015) at p. 2. The CPUC is the next-in-line public agency with discretionary approval of the CPCN.

¹³ Administrative Law Judge’s Ruling Giving Notice of Timing of Prehearing Conference (June 10, 2015) at p. 2.

¹⁴ CPUC Final Subsequent EIR, (Oct. 2018) at p. ES-2.

¹⁵ City of Riverside’s Final EIR (Feb. 5, 2013) (filed Apr. 15, 2015).

¹⁶ *Ibid.*

¹⁷ CPUC Final Subsequent EIR (Oct. 2018) at p. ES-2.

¹⁸ Administrative Law Judge’s Ruling Giving Notice of Timing of Prehearing Conference (June 10, 2015) at p. 3.

¹⁹ CPUC Final Subsequent EIR (Oct. 2018).

The elements of the “Revised Project” within the Commission’s SEIR were limited to:

1. Relocated Overhead 320-kV Double-Circuit Transmission Line-Wineville Avenue,
2. New Underground 230-kV Double-Circuit Transmission Line-Limonite Avenue to the Goose Creek Golf Club,
3. Distribution Line Relocations,
4. Telecommunications Line, and
5. Etiwanda Marshalling Yard.

A prehearing conference was held on November 13, 2018.²⁰ On December 20, 2018, the Assigned Commissioner issued an *Assigned Commissioner’s Scoping Memo and Ruling* (Scoping Memo and Ruling). The Scoping Memo and Ruling states that the public comment period for the SEIR had been closed.²¹ The Scoping Memo and Ruling reiterated:

The Administrative Law Judge (ALJ) June 10, 2015 ruling gave notice that any person who wished to present information regarding the identification of significant environmental impacts, mitigation measures and alternatives, and the environmentally superior alternatives should do so through public comment on the draft SEIR.”²²

The Scoping Memo and Ruling made it unquestionably clear that “[w]e will not take further evidence on these issues.”²³

On June 24, 2019, intervenors served testimony on all issues except transmission design and cost.²⁴ Intervenors’ testimony on transmission design and cost was served on July 2, 2019.²⁵ Rebuttal testimony from SCE and from The City of Riverside (Riverside)

²⁰ Notice of Prehearing Conference (Oct. 3, 2018).

²¹ Scoping Memo and Ruling (Dec. 20, 2018) at p. 3.

²² Notice of Timing of Prehearing Conference (June 10, 2015), p. 5; Scoping Memo and Ruling (Dec. 20, 2018) at p. 3.

²³ Scoping Memo and Ruling (Dec. 20, 2018) at p. 3.

²⁴ E-Mail Ruling Granting Extension of Procedural Schedule (Apr. 11, 2019).

²⁵ E-Mail Ruling Granting Extension of Procedural Schedule (Apr. 11, 2019).

was served on August 16, 2019.²⁶ Rebuttal testimony from intervenors was served on August 16, 2019.²⁷ The CPUC held Evidentiary Hearings on September 4-6, 2019.²⁸

As part of its June 24, 2019 testimony, the CAISO states the RERC generation assets are subject to a FERC sanctioned agreement between the CAISO and Riverside “to manage use of the RERC generation assets to meet the CAISO’s needs and local area needs.”²⁹ “According to this agreement, the RERC units are subject to a variance that provides Riverside with dispatch control over the RERC generation during high load conditions in its local area (*i.e.*, when the Riverside area loads exceed 400 MW). This means that RERC unit dispatch is controlled by Riverside to alleviate local issues rather than the CAISO’s security constrained economic dispatch.”³⁰ Once the RTRP is built, both the CAISO and Riverside anticipate that the variance will be rescinded and the CAISO will have increased ability to dispatch RERC generation, limited only by the South Coast Air Quality Management District (SCAQMD) requirements.³¹

Nowhere in SCE’s application for a CPCN for RTRP does it offer or anticipate that dispatch of RERC by the CAISO would be a consequence of allowing Riverside to decrease its reliance on internal generation resources like the RERC.³² The CAISO’s

²⁶ Exhibit SCE-2 (Aug. 16, 2019); Exhibit RIV-2 (Aug. 16, 2019).

²⁷ E-Mail Ruling Granting Extension of Procedural Schedule (Apr. 11, 2019).

²⁸ E-Mail Ruling Granting Extension of Procedural Schedule (Apr. 11, 2019).

²⁹ Exhibit CAISO-1 at p. 2.

³⁰ *Ibid.*

³¹ Exhibit RIV-1 at p. 45. fn. 32. “RERC operating permit limits operation of RERC 1 and 2 to approximately 1,200 hours per year or so on average, less than 4 hours per day. RERC 3 and 4 have slightly higher operating hours (approximately 1,800 per year) but are further limited in the number of starts each month to 40 starts.”

³² *Amended Application Of Southern California Edison Company (U 338-E) For A Certificate Of Public Convenience And Necessity To Construct The Riverside Transmission Reliability Project: A Final Environmental Impact Report Certified By The City Of Riverside As Lead Agency, Along With The Entire Administrative Record Of The Proceedings Before Riverside, Are Being Separately Filed As An Archival DVD As Equivalent Information To A Proponent’s Environmental Assessment Consistent With CPUC General Order 131-D § Ix.A.1.H* (April 30, 2015) at p. 10, et.al.

June 24, 2019 testimony, eight months after the SEIR was issued in October of 2018³³ was the first indication that the RERC generation units may be used more often after construction of the RTRP.³⁴

III. THE COMMISSION ACTED WITHOUT, OR IN EXCESS OF, ITS POWERS OR JURISDICTION

A. The Decision fails to include relevant information that precludes informed decision making and informed public participation, in violation of the statutory goals of the EIR process.³⁵

An agency that is implementing the requirements of CEQA must adhere to the basic policies and substantive obligations established by CEQA.³⁶ Accordingly, an environmental document prepared pursuant to a certified regulatory program must include a description of the project, alternatives to the project, and mitigation measures to minimize any significant adverse environmental impact.³⁷ In this case, the Commission has acted in excess of its jurisdiction when it certified the SEIR without considering changes in the project scope and without allowing public input or an opportunity to be heard by parties on environmental issues related to future market dispatch of RERC gas turbines by CAISO.

The SEIR that the Commission certified incorporated the changes in SCE's proposed project *but excluded any environmental impact analysis from air emissions or other environmental impacts from RERC* after RTRP was operational³⁸ because that

³³ See CPUC Final Subsequent EIR at https://www.cpuc.ca.gov/Environment/info/panoramaenv/RTRP/PDF/Final_SEIR/VOL1/RTRP_FSEIR_0.0_Cover%20TOC.pdf

³⁴ See Exhibit CAISO-1.

³⁵ *Al Larson Boat Shop, Inc. v. Board of Harbor Commissioners* (1993) 18 Cal.App.4th 729, 748 [22 Cal. Rptr.2d 618]; *Planning & Conservation League v. Castaic Lake Water Agency* (2009) 180 Cal.App.4th 210, 242 [103 Cal.Rptr.3d 124.]; *Planning & Conservation League v. Castaic Lake Water Agency*, supra, 180 Cal.App.4th at p. 242.

³⁶ *Sierra Club v. State Board of Forestry* (1994) Cal.App.4th at 1215, 1236-1237.

³⁷ Pub. Res. Code Section 21080.5, subd. (d)(3)(A).

³⁸ CPUC Final Subsequent EIR, section 2, "Project Description" (Oct. 2018).

change in project scope was not known to the Commission or parties at the time that the SEIR was being developed. As stated above, the only indication that there would be a potential change in the scope of the RTRP that included reference to use of the RERC generation units *after* construction of the RTRP was in testimony served by the CAISO on June 24, 2019,³⁹ *eight months after the SEIR was issued.*⁴⁰

Indeed, the only opportunity in the CPCN proceeding to provide any record evidence for potential environmental impacts of the CAISO dispatch of RERC was during development of the draft SEIR, a full three years before CAISO revealed this project change in June 2019.⁴¹

The Decision finds fault with the Public Advocates Office for raising this issue for the first time in its comments on the proposed decision.⁴² But the Scoping Memo and Ruling made it clear that parties could not present information regarding the identification of significant environmental impacts, mitigation measures, and alternatives other than through comment on the draft SEIR.⁴³ However, the comment period on the draft SEIR closed on May 17, 2018,⁴⁴ a full thirteen (13) months before testimony was served on this issue by CAISO in June, 2019.

The Decision also states that this issue, raised by the Public Advocates Office, is “refuted by the record” in this proceeding,⁴⁵ but without reference to any record evidence. There is no evidence of this issue in the record, because as demonstrated above, such evidence was not allowed.

³⁹ See Exhibit CAISO-1.

⁴⁰ See CPUC Final Subsequent EIR at https://www.cpuc.ca.gov/Environment/info/panoramaenv/RTRP/PDF/Final_SEIR/VOL1/RTRP_FSEIR_0.0_Cover%20TOC.pdf

⁴¹ Notice of Timing of Prehearing Conference (June 10, 2015) at p. 5; Scoping Memo and Ruling (Dec. 20, 2018) at p. 3.

⁴² D.20-03-001 at p. 31.

⁴³ Scoping Memo and Ruling (Dec. 20, 2018) at p. 3.

⁴⁴ See <https://www.cpuc.ca.gov/Environment/info/panoramaenv/RTRP/index.html>

⁴⁵ D.20-03-001 at p. 31.

B. By Excluding the CAISO's plan to Market Dispatch the RERC, the SEIR did not adequately define the "Project" or Baseline Assumptions as required by CEQA

Under CEQA, the RTRP is a "Project" because it is an activity which may cause either a direct physical change in the environment, or a reasonably foreseeable indirect physical change in the environment, and which involves the issuance to a person of a lease, permit, license, certificate, or other entitlement for use by one or more public agencies, or approval by government of privately-initiated permits.⁴⁶ Section 15378 of the CEQA Guidelines defines "project" as the "whole of the action" that may result in either a direct or reasonably foreseeable indirect physical change in the environment. A project description in an EIR "must contain sufficient specific information about the project to allow the public and reviewing agencies to evaluate and review its environmental impacts." A project description that omits integral components of the project may result in an EIR that fails to disclose the actual impacts of the project.⁴⁷

Additionally, and closely related, an EIR that does not clearly identify the baseline assumptions cannot be certified because it fails to adequately describe the existing environmental setting under Cal. Code of Regulations, Title 14, § 15125, subd. (a).⁴⁸ Before the impacts of a project can be assessed and mitigation measures considered, an environmental impact report must describe the existing environment. It is only against this baseline that any significant environmental effects can be determined.⁴⁹

In this case, the CAISO's plan to dispatch RERC generation was made known to the Energy Division as early as June 24, 2019, when the CAISO served testimony in this proceeding,⁵⁰ but several months after the Final SEIR was published and after the

⁴⁶ Pub. Res. Code, § 21065 (Deering).) See also *Friends of the Earth v. Board of Supervisors* (1972) 8 Cal.App.3d at pp. 247 and 257-262.

⁴⁷ *Dry Creek Citizens Coalition v. County of Tulare* (1999) 70 Cal.App.4th 20, 23 [82 Cal.Rptr.2d 398].

⁴⁸ *San Joaquin Raptor Rescue Center v. County of Merced* (2007) 149 Cal.App.4th 645, 646 [57 Cal.Rptr.3d 663].

⁴⁹ *Save Our Peninsula Committee v. Monterey County Bd. of Supervisors* (2001) 87 Cal.App.4th 99, 107 [104 Cal.Rptr.2d 326].

⁵⁰ Exhibit CAISO-1 at p. 1.

Scoping Memo had prohibited additional record evidence on environmental impacts. Yet, there is no evidence in the record that the Energy Division attempted to supplement its environmental baseline analysis and allow for additional public input.⁵¹

The record in this proceeding is replete with evidence following the June 24, 2019 testimony by CAISO that one of the goals of the RTRP was to allow CAISO to market dispatch of RERC generators.⁵² The CAISO sees the benefit of building the RTRP as allowing automatic dispatch of the RERC generation units to service other customers on the BES. As CAISO testifies, the RERC generation assets are subject to a FERC sanctioned agreement between CAISO and Riverside “to manage use of the RERC generation assets to meet the CAISO’s needs and local area needs.”⁵³ “According to this agreement, the RERC units are subject to a variance that provides the Riverside Public Utilities with dispatch control over the RERC generation during high load conditions in its local area (*i.e.*, when Riverside area loads exceed 400 MW). This means that RERC unit dispatch is controlled by Riverside to alleviate local issues rather than the CAISO’s security constrained economic dispatch.”⁵⁴ Once the RTRP is built, both the CAISO and the Riverside Public Utilities anticipate that the variance will be rescinded and the CAISO will have increased ability to dispatch RERC generation, limited only by the South Coast Air Quality Management District requirements.⁵⁵

Testimony by the CAISO, that is part of the record in this proceeding, supports the obvious conclusion that market dispatch of RERC by the CAISO is part of the “whole of

⁵¹ CPUC Final Subsequent EIR (Oct. 2018); Scoping Memo and Ruling (Dec. 20, 2018) at p. 3.

⁵² *Ibid.* See also Public Advocates Office Opening Brief at pp. 8-9, 19; CAISO Opening Brief at p. 3; Riverside Reply Brief at p. 5.

⁵³ Exhibit CAISO-1 at p. 2.

⁵⁴ *Ibid.*

⁵⁵ Exhibit RIV-1 at p. 45, fn. 32. “RERC operating permit limits operation of RERC 1 and 2 to approximately 1,200 hours per year or so on average, less than 4 hours per day. RERC 3 and 4 have slightly higher operating hours (approximately 1,800 per year) but are further limited in the number of starts each month to 40 starts.”

the action” as required by law. However, there is no record evidence that this element was included in the description of the project that was analyzed in the SEIR.

IV. THE FINDINGS IN THE DECISION ARE NOT SUPPORTED BY SUBSTANTIAL EVIDENCE IN LIGHT OF THE WHOLE RECORD

A. The Commission erred in that it did not determine whether market dispatch by the CAISO of the RERC may have a significant effect on the environment.

As referenced above, market dispatch of the RERC by the CAISO was made known to the Energy Division of the CPUC in June 2019 and that it was a consequence of the Commission’s consideration of the CPCN application for RTRP. But the SEIR had not considered the new potential environmental impacts as part of the project. An agency must determine whether the project may have a significant effect based on substantial evidence “in light of the whole record.”⁵⁶ The term “significant effect on the environment” is defined as “a substantial, or potentially substantial, adverse change in any of the physical conditions within the area affected by the project including land, air, water, minerals, flora, fauna, ambient noise, and objects of historic and aesthetic significance.”⁵⁷ In this case, the Commission has not determined whether there is a significant effect from dispatch of the RERC generation by the CAISO because that consideration is wholly absent from the Commission’s environmental review of the RTRP.

The fact that the RERC units are currently under an air quality limiting permit does not relieve the Commission of its responsibility to assess the environmental impact under CEQA. The RERC generation units are currently under an air quality permit issued by the South Coast Air Quality Management District.^{58,59} The California

⁵⁶ Pub. Res. Code, Section 21082.2 subd. (a); CEQA Guidelines, Section 15064, subd. (a)(1).

⁵⁷ CEQA Guidelines, Section 15382.

⁵⁸ Exhibit RIV-1 at p. 58.

⁵⁹ Exhibit RIV-1 at p. 45, fn. 32. Riverside reports that RERC generation units 1 and 2 (48 MW each) are limited to approximately 1,200 hours per year, while RERC generation units 3 and 4 (48 MW each) are limited to approximately 1,800 per year, with no more than 40 starts per month, due to the facility’s air permit.

Supreme Court has held that the physical conditions actually existing at the time of analysis should be used as the baseline, rather than the maximum permitted capacity, in determining whether there would be a significant effect on the environment within the meaning of Pub. Resources Code, §§ 21068, 21100, subd. (a), 21151, subd. (a).⁶⁰ The court stated that vested rights under existing permits did not justify failing to perform an environmental review. The court, affirming the judgment of the court of appeal, found that it was improper under CEQA to use the maximum permitted operations as a baseline.⁶¹ The court ruled that comparing the proposed project impacts to what could happen under existing permits, rather than comparing the proposed project impacts to what was actually occurring, constituted reliance on an impermissible hypothetical baseline that would mask the proposed project's true impacts.⁶²

Nowhere in the SEIR are air quality impacts considered from the market dispatch changes for the RERC cited in the Decision.⁶³ The only air quality impacts considered in the SEIR are related to:

1. Construction activities that would generate emissions from ground-disturbing activities in excess of the SCAQMD standards.⁶⁴
2. Coatings that could be applied during the proposed RTRP construction that would comply with existing Rule 1113, Architectural Coatings.⁶⁵
3. Operation and Maintenance activities that would require SCE personnel to be present during operation of the new transmission facilities.⁶⁶

⁶⁰ *Communities for a Better Env't*, 48 Cal.App.4th at 322. (2010).

⁶¹ *Id.* at 311.

⁶² *Ibid.*

⁶³ See City of Riverside's Final EIR at Table 4.3-10.

⁶⁴ City of Riverside's Final EIR at pp. 4.3-28.

⁶⁵ *Ibid.*

⁶⁶ *Ibid.*

B. The Commission errs in making a statement of overriding consideration of the environmental impacts of RERC when the SEIR never analyzed or even considered those potential impacts.

The Decision states the market dispatch of RERC by CAISO is one of the overriding considerations that outweigh the project’s “unavoidable impacts on aesthetics, agricultural and forestry resources, noise and transportation and traffic, and its significant contribution to cumulative hydrology and water quality impacts.”⁶⁷ Making “the Riverside Energy Resource Center [RERC] generation units available for California Independent System Operator (CAISO) market dispatch...[is an] overriding consideration...”⁶⁸ The Decision repeatedly states that one of the benefits of the RTRP is “making the Riverside Energy Resource Center generation units available for CAISO market dispatch to support system reliability, flexibility and efficiency and reducing the need for non-consequential load shedding within Riverside...”⁶⁹

But as recognized under CEQA, a statement of overriding consideration has to be made *after* analyzing the environmental impacts of a project and *after* determining that the impacts are significant.⁷⁰ In this case, the environmental impacts of market dispatch of the RERC by the CAISO was never considered in the record and was affirmatively precluded from inclusion in the record by the Scoping Memo and Ruling (*supra*).⁷¹

It is not lawful for the Commission to find overriding considerations of the market dispatch option of RERC when it never considered the environmental impacts of that part of the project.⁷² As articulated by the 4th Appellate Court, a statement of overriding

⁶⁷ D.20-03-001 at p. 35.

⁶⁸ D.20-03-001 at p. 20.

⁶⁹ D.20-03-001 at p. 35.

⁷⁰ *Cherry Valley Pass Acres & Neighbors v. City of Beaumont* (2010) 190 Cal.App.4th 316, 323 [118 Cal.Rptr.3d 182].

⁷¹ Scoping Memo and Ruling (Dec. 20, 2018) at p. 3.

⁷² Also implicit in the Decision’s statement of overriding consideration is that the Commission finds that RERC does have a significant impact on the environment that requires the Commission to override it in its approval.

considerations reflects the final stage in the decision making process where a public agency can approve a project with significant environmental impacts only if it finds such effects can be mitigated or concludes that unavoidable impacts are acceptable because of overriding concerns.⁷³ These reasons constitute the statement of overriding considerations which is intended to demonstrate the balance struck by the body in weighing the benefits of a proposed project against its unavoidable environmental risks.

The Decision cannot leapfrog over the required steps in CEQA to make a statement of overriding consideration before it considers the environmental impacts of the proposed project.

V. THE COMMISSION HAS NOT PROCEEDED IN THE MANNER REQUIRED BY LAW.

In reaching its determination to issue a CPCN, the Commission must consider the influence of a proposed project on the environment.⁷⁴ The Commission concluded that Pub. Util. Code § 1002(a) imposes a "responsibility independent of CEQA to include environmental influences...[in] consideration of a request for a CPCN."⁷⁵ The Commission determined that the fourth factor in Pub. Util. Code § 1002(a), consideration of a proposed project's influence on the environment, is appropriately addressed through the CEQA process.⁷⁶ Because the SEIR had not considered the potential environmental impacts from market dispatch of the RERC by the CAISO, it has not complied with Pub. Util. Code § 1002(a) or the requirements under CEQA.

The fundamental purpose of an EIR is “to provide public agencies and the public in general with detailed information about the effect which a proposed project is likely to

⁷³ *County of San Diego v. Grossmont-Cuyamaca Community College Dist.* (2006) 141 Cal.App.4th 86, 101 [45 Cal.Rptr.3d 674].

⁷⁴ D.09-12-044, *In the Matter of the Application of Southern California Edison Company (U 338-E) for a Certificate of Public Convenience and Necessity Concerning the Tehachapi Renewable Transmission Project* (Segments 4 through 11) 2009 Cal. PUC LEXIS 791.

⁷⁵ *Ibid.*

⁷⁶ *Ibid.*

have on the environment.”⁷⁷ To that end, the EIR “shall include a detailed statement setting forth [a]ll significant effects on the environment of the proposed project.”⁷⁸ The California Environmental Quality Act, California Pub. Res. Code § 21000 et seq., requires consideration of the potential environmental effects of the proposed project actually approved by the public agency, and not a hypothetical project.⁷⁹ An EIR must include an analysis of the environmental effects of actions associated with the proposed project if: (1) it is a reasonably foreseeable consequence of the initial project; and (2) the related action will be significant in that it will likely change the scope or nature of the initial project or its environmental effects.⁸⁰ In this case, it is certain that the CAISO will market dispatch the RERC generators. The questions that must be determined in the SEIR are how the CAISO’s market dispatch of the RERC generators will be different than current operations and whether that change will result in a significant environmental impact. It is at least reasonably foreseeable that the operation of RERC generators will change after the RTRP is constructed and that this action may result in an impact to air quality.

Although the Decision addresses the effects on the environment from air quality, the only air quality impacts addressed by the SEIR or Mitigation Monitoring and Reporting Plan, is for increased hydrocarbon emission and particulate contamination during construction.⁸¹ In the present case, it is reasonably foreseeable that the

⁷⁷ Pub. Res. Code § 21061.

⁷⁸ Pub. Res. Code § 21100, subd. (b)(1).)

⁷⁹ *Rio Vista Farm Bureau Center v. County of Solano*, Court of Appeal of California, First Appellate District, Division One. (Apr. 09, 1992) 5 Cal.App.4th 351. See also *Laurel Heights Improvement Ass'n v. Regents of Univ. of Cal.*, 47 Cal.App.3d 376, 253 Cal.Rptr. 426, 764 P.2d 278 (1988) (The court affirmed the decision of the court of appeals in part, holding that petitioner neighborhood association's petition for a writ of mandate to invalidate the approval of an environmental impact report by respondent university regents should have been granted because the report failed to discuss anticipated future uses of the proposed facility and its environmental impact.).

⁸⁰ *Ibid.*

⁸¹ CPUC Final Subsequent EIR at pp. 4.3-28.

Commission's action in approving this CPCN will result in a change in air emission from the RERC.

Because the Commission has not proceeded in a manner required by Pub. Util. Code § 1002 and under CEQA, a reviewing court will assess any defective process claims de novo and will not give deference to the Commission's opinion. "In evaluating an EIR for CEQA compliance, ... a reviewing court must adjust its scrutiny to the nature of the alleged defect, depending on whether the claim is predominantly one of improper procedure or a dispute over the facts."⁸² When the claim is predominantly one of procedure, courts conduct an independent review of the agency's action.⁸³ When the informational requirements of CEQA have not been met, courts have found that an agency has failed to proceed in a manner required by law and, therefore, has abused its discretion.⁸⁴ As demonstrated above:

1. No information or analysis of the potential air impacts of market dispatch of the RERC generation by the CAISO were considered in the SEIR.
2. As required by the December 20, 2018 Scoping and Ruling Memo, no evidence of the potential environmental impacts of the RERC generation by the CAISO was allowed into the record.
3. The Commission made an unlawful finding of overriding considerations because it did not consider the environmental impacts of market dispatch of the RERC by the CAISO.

VI. CONCLUSION

For all the reasons cited above, the Decision fails to consider all of the significant environmental impacts of the proposed project pursuant to Pub. Util. Code § 1002(a)(4) and does not comply with CEQA. D. 20-03-001 should be vacated by the Commission

⁸² *Vineyard Area Citizens for Responsible Growth, Inc. v. City of Rancho Cordova* (2007) 40 Cal.App.4th 412 [53 Cal.Rptr.3d 821, 150 P.3d 709].

⁸³ *POET, LLC v. State Air Resources Bd.* (2013) 218 Cal.App.4th 681, 709 [160 Cal.Rptr.3d 69].

⁸⁴ *California Sportfishing Protection Alliance v. State Water Resources Control Bd.* (2008) 160 Cal.App.4th 1625 [73 Cal.Rptr.3d 560].

until these legal errors are cured. At a minimum, the Commission needs to supplement the SEIR with an evaluation of the environmental impacts of the CAISO market dispatch of the RERC and comply with all applicable procedural rules.

Respectfully submitted,

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